Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

No. 77-1819

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD, PETITIONERS

v.

VERMILION CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

WILLIAM ALSUP
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MARTIN GREEN
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	18

CITATIONS

Cases:

Cardinale v. *Louisiana*, 394 U.S. 437	8
Connecticut Action Now, Inc. v. *Roberts Plating Co.*, 457 F.2d 81	13
Cort v. *Ash*, 422 U.S. 66	13
Douglas v. *Seacoast Products, Inc.*, 431 U.S. 265	5
Dow Chemical Co., Inc. v. *Dixie Carriers, Inc.*, 330 F. Supp. 1304, cert. denied, 409 U.S. 1040	16
Dwinel v. *Barnard*, 28 Me. 554	7, 13
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1	5
Hamilton v. *Vicksburg, S. & P.R.R.*, 119 U.S. 280	5-6
Harmon v. *Chicago*, 147 U.S. 396	5
Huse v. *Glover*, 119 U.S. 543	6
Ilhenny v. *Broussard*, 172 La. 895	14
James River & Kanawha Canal Parks, Inc. v. *Richmond Metropolitan Authority*, 359 F. Supp. 611, aff'd, 481 F. 2d 1280	13
McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430	8
Morris v. *Tennessee Valley Authority*, 345 F. Supp. 321	13

Potomac River Ass'n, Inc. v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344 13
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 5
Sanitary District v. *United States*, 266 U.S. 405 12
Sierra Club v. *Morton*, 400 F. Supp. 610 13
Silver Springs Paradise Co. v. *Ray*, 50 F.2d 356 ..... 6, 10
United States v. *Appalachian Electric Power Co.*, 311 U.S. 377 ..... 5, 9
United States v. *Arizona*, 295 U.S. 174 14
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53 ..... 5, 8
United States v. *Chicago, M., St. P., & P.R.R.*, 312 U.S. 592 8-9
United States v. *Commodore Park, Inc.*, 324 U.S. 386 9
United States v. *Kaiser Aetna, et al.*, Nos. 76-1968 and 76-2400 (9th Cir. Aug. 11, 1978), cert. pending, No. 78-738 ..... 10, 14
United States v. *Rands*, 389 U.S. 121 ..... 8, 9
United States v. *Republic Steel Corp.*, 362 U.S. 482 ..... 8, 12, 14
United States v. *Rio Grande Irrigation Co.*, 174 U.S. 690 8
United States v. *Sexton Cove Estate, Inc.*, 526 F.2d 1293 ..... 9, 16
United States v. *Twin City Power Co.*, 350 U.S. 222 9
United States v. *Willow River Power Co.*, 324 U.S. 499 9
Wyandotte Co. v. *United States*, 389 U.S. 191 ..... 12, 14

Statutes, rule and regulations: Page

Act of April 8, 1812, ch. 50, 2 Stat. 701 5
2 Stat. 703 5
Rivers and Harbors Act of 1899, 33 U.S.C. 401, *et seq.* 3, 11
33 U.S.C. 403 12
Sup. Ct. R. 23(1)(c) 8
33 C.F.R. Parts 322 and 325, 42 Fed. Reg. 37139, 37149 15
33 C.F.R. 322.2, 42 Fed. Reg. 37139 (1977) 10
33 C.F.R. 322.4, 42 Fed. Reg. 37140 (1977) 15
33 C.F.R. 322.5(g), 42 Fed. Reg. 37141 (1977) 10
33 C.F.R. 325.3(b), 42 Fed. Reg. 37152 (1977) 14
33 C.F.R. 329.8, 42 Fed. Reg. 37162 (1977) 9
33 C.F.R. 329.12(b), 42 Fed. Reg. 37163 (1977) 10

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD, PETITIONERS

v.

VERMILION CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief responds to the Court's invitation of October 2, 1978.

JURISDICTION

The Supreme Court of Louisiana denied review of the court of appeal's judgment on March 27, 1978 (Pet. App. A-18). The petition for a writ of certiorari was filed on June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether an artificially constructed navigable waterway, built and maintained privately and situated on private land but connecting with navigable waterways of the United States, is a navigable waterway of the United States to which the public has a right of access by virtue of federal law.

2. When a privately constructed canal diverts and destroys a preexisting navigable waterway of the United States to which the public had access, whether federal law gives the public a right of access to the canal.[1]

STATEMENT

A final judgment has been entered against petitioners under the trespass laws of Louisiana enjoining them from entering on privately constructed canals located on respondent's private property (Pet. App. A-5). The Louisiana courts rejected as legally insufficient petitioners' allegations that the canals are navigable waters of the United States and that the canals had destroyed a preexisting natural navigable waterway by diverting those navigable waters into the canal system (Pet. App. A-2, A-10).

Respondent Vermilion Corporation is the lessee of a large tract of land in Vermilion Parish, Louisiana. On this land is a network of canals that connects with the navigable waterways of the Gulf Intercoastal

[1] We do not discuss the question whether petitioners may be prevented from fishing in respondent's canals.

Waterway on the north, the Gulf of Mexico on the south, the West Cheniere Au Tigre Canal on the east, and the Rollover Bayou on the west (Pet. App. A-8). The canals were built and have been maintained by respondent, its lessor, or their predecessors or agents (Pet. App. A-21). The canals are sixty feet wide and eight feet deep, are subject to tidal fluctuations, and are navigable in fact, being regularly used by a variety of vessels (Pet. App. A-8). Respondent brought these actions to enjoin petitioners from entering on the canals and from engaging in commercial fishing or shrimping in the canals (Pet. App. A-20, A-33).

In their answers, petitioners interposed the affirmative defenses that the canals are navigable waters of the United States and thus "burdened with a paramount easement of use in favor of the public," and that respondent's attempt to restrain petitioners' use of the canals constituted an obstruction of navigable waterways in violation of the Rivers and Harbors Act, 33 U.S.C. 401 *et seq.* (Pet. App. A-37-A-38, A-41, A-45).

The trial court granted summary judgment for respondent (Pet. App. A-2) over petitioners' objection that there were substantial issues of fact. Petitioners submitted an affidavit (Pet. App. A-109-A-110) asserting that, for as long as they could remember,

> the Humble Canal System has been used by fishermen, hunters, trappers, sportsmen, and generally anyone who wanted to use same. Broussard's and Hazel's Landings have been public

> landings and launch ramps on the Humble Canal System for years.

The affidavit also asserted:

> Prior to the development of the Humble Canal System, deponents are aware that various portions of the natural navigable waterway system in the area of Pecan Island, for example, Little Rollover Bayou and Freshwater Bayou, were actually used for the purpose of transporting mail, transporting cattle, and transporting people, to and from Pecan Island on various kinds of small vessels. These natural waterways only ceased to be useable for these purposes after Humble developed its artificial waterway system.

In granting respondent's motion for summary judgment, the Louisiana district court held that there was no right of public access to the canals because they were constructed with private funds on private property, were privately maintained, and their use had been restricted to persons given permission by respondent (Pet. App. A-2). The court rejected as a matter of law the claim that the diversion of navigable waters of the United States made the canals a public waterway (Pet. A-2). The Louisiana Court of Appeal, Third Circuit, affirmed on the same grounds (Pet. App. A-9-A-11). The Supreme Court of Louisiana denied review (Pet. App. A-18-A-19).

ARGUMENT

1. The authority of the federal government over the navigable waters of the United States permits Congress to protect and regulate the public's historic right of access to those waters. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 173-178 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 404-405 (1940). *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913); *Harman* v. *Chicago*, 147 U.S. 396, 407 (1893); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824).

Congress has protected the right of access to navigable waters by the terms of the various "organic acts" admitting new states to the Union. Thus, the Act admitting Louisiana to the United States, Act of April 8, 1812, ch. 50, 2 Stat. 701, provides that Louisiana's navigable waterways "shall be common highways, and for ever free" (2 Stat. 703):

> [I]t shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state as to inhabitants of other states and the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state * * *.

This provision plainly recognizes a right of public access to natural waterways. *Hamilton* v. *Vicks-*

burg, S. & P. R.R., 119 U.S. 280, 284-285 (1886); see *Silver Springs Paradise Co.* v. *Ray*, 50 F.2d 356, 358 (5th Cir. 1931). But this Court has never decided, so far as we are aware, whether the right of access extends to artificial waterways privately constructed and maintained under circumstances such as those presented here. Nor has this Court squarely decided whether diversion of a natural waterway into an artificial one, thereby destroying the natural waterway, entitles the public to navigate the privately owned artificial channel even if the public would not otherwise have that right.

In *Huse* v. *Glover*, 119 U.S. 543, 548 (1886), the Court dealt with the latter question and virtually established a right of public access, subject to payment of reasonable tolls for the use of the improvement. The State of Illinois had constructed a series of locks and dams along the Illinois River for the purpose of improving navigation, but the improvements made navigation on the river impossible unless the canals were used. A steamboat company objected to payment of the tolls for use of the canals, relying on statutory language similar to that of the Louisiana Organic Act. In the course of holding that Congress could not have meant to forbid tolls designed to improve navigation, the Court explained—with specific reference to the Louisiana Organic Act—that Congress intended in such acts to "prevent any exclusive use of the navigable waters of the State—a possible farming out of the privilege of navigating

them to particular individuals, classes, or corporations * * *." *Id.* at 548. The object of the acts "was to preserve the rivers as highways equally open to all persons without preference to any, and * * * [to] prevent the use of the navigable streams by private parties to the exclusion of the public * * *." *Id.* at 547.

Although the precise question was not presented in *Huse* v. *Glover*, it seems clear that the Court would not have approved a state law in Illinois authorizing a private company to construct the canals and locks, thereby making passage in the natural channel impossible, and granting the company the exclusive use of the canals. Nor would the Court have permitted Illinois to accomplish the same result without a statute, by allowing the company to construct the canals and locks on the company's own land and then enabling the company to secure exclusive use of the canals through the State's common law of trespass.

Similarly, on the facts alleged in the present case, Louisiana may not allow a private corporation to create a canal system that destroys and replaces a natural waterway protected by the Louisiana Organic Act, and then let that corporation appropriate the exclusive use of the canals to itself and its lessees through the State's trespass laws. See *Dwinel* v. *Barnard*, 28 Me.554, 562 (1848).

However, these issues arising under the Louisiana Organic Act were not presented in the courts below, were not decided in those courts, and are not pre-

sented in the petition for certiorari, unless petitioner's references to the "navigation servitude" are deemed sufficient to present them. Thus, a serious question of this Court's jurisdiction and practice is presented. *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969); Sup. Ct. R. 23(1)(c). The United States expresses no view on that question.

2. Without relying on the Louisiana Organic Act, petitioners contend that all navigable waters of the United States are burdened with a "navigation servitude" that entitles the public to travel those waters. The fact that the water in respondent's canal system is navigable, they contend, entitles them to access.

It has, indeed, repeatedly been held that navigable waters and the private lands over which they flow are subject to a servitude which Congress has the power to protect. *E.g.*, *United States* v. *Rands*, 389 U.S. 121, 122-123 (1967); *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 703 (1899). Under this power, Congress in the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*) has forbidden any obstruction, modification, or improvement to the navigable waters of the United States without the government's prior approval. See, *e.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 487-490 (1960). Because of this servitude, no compensation need be paid to the landowner for impairment of the water flow resulting from federal regulation of navigable waters. *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 69; *United States* v. *Chicago, M., St. P., & P. R. R.*, 312 U.S. 592, 595-597 (1941); *United States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945); *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945); *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225-228 (1956); *United States* v. *Rands*, *supra*, 389 U.S. at 122-123. The power applies not only to naturally navigable waterways, but to ones that have artificially been made navigable or that can be made so by a reasonable amount of improvements. *United States* v. *Appalachian Electric Power Co.*, *supra*, 311 U.S. at 407-408.

Respondent's canal system, its artificial nature notwithstanding, is therefore subject to the congressional power over navigable waterways. The Louisiana courts have found that respondent's canals are navigable in fact (Pet. App. A-8). They are subject to tidal fluctuations, and they carry vessels engaged in hydrocarbon exploration, fishing, hunting, and trapping (*ibid.*). Moreover, they connect with other canals and with the Gulf of Mexico (*ibid.*). They are navigable waters of the United States. See *United States* v. *Appalachian Electric Power Co.*, *supra*, 311 U.S. at 409; *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976).[2]

---

[2] 33 C.F.R. 329.8, 42 Fed. Reg. 37162 (1977), provides in part:

> (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed

Under analogous circumstances, at least two courts of appeals have held that the public has a right to access to such navigable waters. *Silver Springs Paradise Co.* v. *Ray, supra*, 50 F.2d at 358; *United States* v. *Kaiser Aetna, et al.*, Nos. 76-1968 and 76-2400 (9th Cir. August 11, 1978), slip op. 10, petition for certiorari pending, No. 78-738. The Louisiana courts in this case, however, disagreed with that view.

Despite this possible conflict, we do not think the issue as presented here is of sufficient recurring im-

above; that is, whether the waterbody is capable of use for purposes of interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in facts supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turing area. (See 33 C.F.R. 329.12(b), 42 Fed. Reg. 37163.)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used for purposes of interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

See also 33 C.F.R. 322.2 and 322.5(g), 42 Fed. Reg. 37139 and 37141 (1977).

portance to warrant review by this Court now. In reaching this conclusion we have in mind especially that the various state organic acts would seem to preempt the issue, certainly with respect to naturally navigable waterways and possibly with respect to artificial ones as well.

3. A different question is presented by petitioners' claim that respondent's canal system destroyed and replaced a preexisting natural navigable waterway to which the public had access, a claim that must be accepted as true for present purposes since it was rejected as legally insufficient by the lower courts. As we have noted, petitioners failed to base this claim on a right of access to the preexisting waterway under the Louisiana Organic Act. But the question is presented (see Pet. 15; Pet. App. A-73) whether the obstruction of the preexisting waterway violated the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, and, if so, whether petitioners are entitled to the remedy they seek of a right of public access to respondent's canal system.[3]

Under the Rivers and Harbors Act, no obstruction, modification, or improvement to the navigable waters of the United States may be made without the prior

[3] The issues under the Rivers and Harbors Act do not depend on identifying the authority under which petitioners and the public had a right of access to the preexisting waterway. Whether that authority was the organic act, the navigation servitude, the Rivers and Harbors Act, another federal law, state law, or English common law brought over to this country, the affidavit submitted below attests to a right of public access to the prior waterway, and the lower courts did not question petitioners' assertion that such access had existed.

approval of Congress or of the Secretary of the Army acting through the Corps of Engineers. 33 U.S.C. 403-406. If respondent's canal system diverted, destroyed, and replaced a preexisting navigable waterway (Pet. App. A-2, A-10, A-109), as was alleged and as we must assume, the canal system itself would constitute a forbidden "obstruction" within the meaning of 33 U.S.C. 403, since it reduced if not eliminated the navigable capacity of the preexisting waters. *Sanitary District* v. *United States*, 266 U.S. 405 (1925); *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 487-490.

It is an open question under Section 403, however, whether as a result of the obstruction petitioners would have an implied statutory right to use the canal system (subject, of course, to the normal "rules of the road" for inland navigation). The only sanctions expressly provided by the Act are criminal penalties and injunctive relief in suits brought by the government. 33 U.S.C. 403, 406. This Court has established, however, that those remedies are not exclusive. In *Wyandotte Co.* v. *United States*, 389 U.S. 191, 201-203 (1967), the Act was held to entitle the government to sue a shipowner that refused to remove its sunken vessel from navigable waters for the cost to the government of removing the vessel.

Wyandotte reasoned that the meager criminal penalties under the Act were too small to be effective without implied rights of enforcement; that the government was a principal beneficiary of the Act, if not the principal beneficiary; and that the harm that had resulted was of the kind that Congress in-

tended to prevent, so that a civil action for damages was an implied remedy under the Act. This result was reached by reliance on cases implying private causes of action from criminal and civil prohibitions. The Court's reasoning suggests that private plaintiffs, insofar as they are also intended beneficiaries of the Act, should not be treated differently from a governmental plaintiff with respect to implied rights of action.

Some lower federal courts have, in fact, held that private parties may seek damages and injunctions as implied remedies for violations of the Act. *E.g.*, *James River and Kanawha Canal Parks, Inc.* v. *Richmond Metropolitan Authority*, 359 F. Supp. 611, 638-640 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973); *Potomac River Ass'n., Inc* v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 357 (D. Md. 1975); *Sierra Club* v. *Morton*, 400 F. Supp. 610, 622-624 (N.D. Cal. 1975); *cf. Cort* v. *Ash*, 422 U.S. 66, 78-80 (1975). *But see Morris* v. *Tennessee Valley Authority*, 345 F. Supp. 321 (D. Ala. 1972), and *Connecticut Action Now, Inc.* v. *Roberts Plating Company*, 457 F.2d 81 (2d Cir. 1972).

Rather than damages or a prohibitive injunction, petitioners seek an equitable remedy of access to the canal system that allegedly replaced and destroyed the preexisting waterway in violation of the Act. Although at least one state court has ordered precisely such a remedy for diversion of natural waterways in violation of state law, *Dwinel* v. *Barnard*, 28 Me. 554, 562 (1848), the issue is one of virtually first

impression under the Rivers and Harbors Act.[4] Arguably, such a remedy is warranted as a means of redressing the injury done to users of the preexisting natural waterways by the Act's violation and as a way of vindicating the Act's purpose in such circumstances, in view of this Court's admonitions that Congress contemplated effective remedies for violations of the Act.[5]

We do not address the merits of that issue, for we do not believe the issue is of sufficient recurring importance to warrant review in this case. Today, before any person can connect a private canal into an existing waterway, the Army Corps of Engineers must grant its approval. 33 C.F.R. 325.3(b), 42 Fed. Reg. 37152 (1977). One of the factors the Corps must consider is the impact of the modification on the navigability of the existing waterway. *Ibid.* In order to protect the public right to navigation, the Corps often conditions its approval on the stipulation "that no attempt * * * be made by the permittee to prevent the full and free use by the public of all

[4] The only previous decision of which we are aware is *Ilhenny* v. *Broussard*, 172 La. 895, 135 So. 669 (1931), which rejected the implied remedy on the ground that any violation of the Act could be remedied by the Secretary of War as appropriate, a holding the lower courts in the present case felt obliged to follow.

[5] "Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences." *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 486, 492. See also *Wyandotte Co.* v. *United States*, *supra*; *United States* v. *Arizona*, 295 U.S. 174 (1935).

navigable waters * * *." 33 C.F.R. Parts 322 and 325, 42 Fed. Reg. 37139, 37149, 37157 (1977). Thus, the present regulatory regime protects the public's interest with respect to diversions of natural waterways. To be sure, that regime evidently has not prevented the injury alleged to have been wrought, in violation of the Act, by the construction and the exclusive maintenance of respondent's canal system. The judgment of the Louisiana courts against petitioners in this case would not, however, prevent further litigation concerning the legal status of respondent's canal system by other parties, either private or governmental.[6] Such litigation could present the questions under the Louisiana Organic Act that have not been presented here, and would be subject to review in this Court on those questions as well as the ones that are presented here.

4. We must acknowledge some conflict in approach between the Louisiana courts in the present case and the Ninth Circuit in *United States* v. *Kaiser Aetna*, Nos. 76-1968 and 76-2400 (9th Cir. August 11, 1978), petition for writ of certiorari pending, No. 78-738. There, the United States sought a declaration on be-

[6] We are informed by the Corps of Engineers that no permit was ever issued to build the canal system in question. It was constructed in "the 1900's" (Pet. App. 8). But see 33 C.F.R. 322.4, 42 Fed. Reg. 37140 (1977) (grandfather clause). We are also informed that the Corps of Engineers is now investigating respondent's canal system to determine whether any administrative or legal action with respect to it is appropriate. If any action is brought by the Corps, it can be expected to develop a more complete record than the affidavit on which the claim in the present case rests (Pet. App. A-109 - A-110).

half of the Corps of Engineers that the Kuapa Pond in Hawaii was a navigable water of the United States subject to Corps jurisdiction and open to public navigation. Kuapa Pond was essentially a land-locked "fishpond" when acquired by Kaiser Aetna, along with surrounding land, for transformation into a residential development and a marina. To connect the fishpond to Maunalua Bay, Kaiser Aetna dredged a short channel across the narrow bar that had separated the two bodies of water. The court of appeals held that Kuapa Pond, as improved, was a navigable water of the United States, although it had been made navigable with private funds and was situated on private lands, and held that any future modifications to the pond/marina would require advance approval by the Corps under the Act.[7] The court also held that the pond was open to public navigation even though Kaiser Aetna desired to maintain it as a private boating area.

The Ninth Circuit reached the conclusion that the pond/marina must be open to the public by ~~concluding~~ reasoning that navigable waters are by definition open for public navigation. The court also considered that federal regulatory authority over navigable waters cannot be

[7] The courts are in agreement that once a private canal interconnects with navigable waters, the private canal may not be modified without prior approval of the Corps of Engineers. *E.g., United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); *Dow Chemical Co., Inc.* v. *Dixie Carriers, Inc.*, 330 F. Supp. 1304 (S.D. Tex. 1971), 463 F.2d 120 (5th Cir.), cert. denied, 409 U.S. 1040 (1972).

separated from the public right of navigation. The Louisiana courts in the present case rejected these arguments, holding that neither the navigation servitude nor the Act grants to "individuals the unrestricted right to use a privately owned navigable canal" (Pet. App. A-16).

The difference in approaches by these courts does not, in our view, justify review. The present case reaches the issue of general public access to navigable waters by failing to consider the Louisiana Organic Act, which might well be dispositive. Moreover, the record with respect to the construction and history of the canal system consists of a single brief affidavit that offers more conclusions than facts; if an enforcement proceeding is brought by the Corps (see note 6, *supra*), a better record could be assembled. At the same time, the putatively conflicting decision of the Ninth Circuit is correct, and it arises in the different context of a federal enforcement proceeding.[8]

[8] We are sending petitioners in *Kaiser Aetna* v. *United States*, No. 78-738, a copy of this brief.

CONCLUSION

For the foregoing reasons, the United States submits that the petition for a writ of certiorari in the present case should be denied. Because of the similarity of the issues presented, the Court may wish to consider the present petition together with the pending petition for a writ of certiorari in *Kaiser Aetna*, No. 78-738. In the event that the Court grants certiorari in either case, it may wish to do so in both cases and consider them together, since they present related issues concerning access to navigable waterways.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

WILLIAM ALSUP
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MARTIN GREEN
Attorneys

DECEMBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 279047 217